UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Criminal No. 92-43-P-H***
	)	
GERRY GENE DRESSER,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On May 28, 1992 the defendant was charged in a 5-count indictment with, *inter alia*, distribution of and possession with intent to distribute marijuana in violation of 21 U.S.C. '' 841(a)(1) and (b)(1)(D) and 18 U.S.C. ' 2 and with the use and possession of a Mossberg 12-gauge shotgun during and in relation to section 841(a)(1) offenses in violation of 18 U.S.C. '' 924(c)(1) and (2). The defendant seeks the suppression of all statements made by him at the time of his arrest and during the search of his residence which followed, as well as of the physical evidence seized from his residence at that time. An evidentiary hearing was held on September 3, 1992. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

Between 9:00 and 10:00 p.m. on May 4, 1992 a team of Maine Drug Enforcement Agency agents, armed with a search warrant, entered the upper level of the defendant's residence on the Bolsters Mills Road in Harrison, Maine. The defendant, who was seated at his kitchen table counting money, and next to whom the agents observed five pounds of marijuana, was immediately arrested.

After the agents completed a security sweep of the residence and determined that its sole occupants were the defendant, his girlfriend and two children who were asleep in basement bedrooms, agent Michael Kelly assigned agents to search various areas of the house and specifically directed agents Scott Durst and Richard Small, Jr. to search the back bedroom, bath and walk-in closet area of the upper level.[1]

[1] The search warrant (*see* Exhibit 1 to Memorandum in Support of Government's Objection to Defendant's Motion to Suppress (Docket Item 14)) authorized a search of the entire residence for scheduled drugs and evidence of the offenses of drug trafficking including marijuana, money and weapons. The agents knew from information provided by a cooperating individual that the defendant kept marijuana and large sums of money in a safe located somewhere in this back area of his residence. The cooperating individual had purchased approximately 150 pounds of marijuana from the defendant over time and had been in the defendant's residence on several occasions. Although he had never been invited to the rear of the house, he nevertheless repeatedly observed the defendant go there and return with marijuana. He also told the authorities that the defendant told him he kept the marijuana and large sums of money in a safe back there. The agents were intent on locating the safe and its contents.

While agents Durst and Small searched the back area, concentrating their efforts on the walk-in closet, agent Kelly initiated an exchange with the defendant. He first explained that the agents were going to conduct a search of the entire premises and had a canine dog outside to assist them.[2] He then asked the defendant if he wished to cooperate. After the defendant and his girlfriend expressed concern about the children being awakened by the search activities, Kelly told them that the agents would be as quiet as possible and asked if the defendant would like to tell him where the contraband was located. The defendant replied that he was willing to indicate where the contraband could be found but beyond that wanted to talk to his lawyer. He then stated that the contraband was in the bedroom and back closet. Kelly also asked the defendant if there were any weapons in the house. The defendant said he had one in the closet off the bedroom. Kelly then went to the closet area and told Durst and Small, whose search of the closet had been underway some 10 to 15 minutes, that what they were looking for was in the closet. At this point Durst started looking at the walls and floor for hidden areas.[3]

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[2] The agents did have an experienced german shepherd with them who was trained to alert, and on several prior occasions had successfully alerted, to the presence of marijuana and other drugs concealed from plain view. Although the dog was brought inside the house to search various areas, it was not taken to the back closet area prior to discovery of the contraband which is the subject of this motion.

[3] The agents knew from experience that contraband was often concealed in such areas and in ceilings and it was their practice to explore these areas fully. Durst testified that this particular search would have continued until the contraband they knew from the cooperating individual was present was

found and, in the process, would have removed walls if necessary.

Several more minutes of search yielded nothing. At this point in the story the accounts of the agents and the defendant diverge significantly. According to Kelly, he then asked the defendant where in particular the items were and the defendant responded that they were behind the wall, which Kelly understood to mean a wall in the walk-in closet. Kelly testified that he relayed this information to Small, who was nearer the closet door than was Durst, and that Smith replied that Durst was already onto something. By contrast, the defendant testified that Durst eventually came out of the back area and into the living room/kitchen area where he told Kelly he could find nothing, leading Kelly to ask the defendant where the contraband was. According to the defendant, he told Kelly it was behind the closet wall, whereupon Kelly, followed by Durst, took him to the back closet where Kelly asked him in the presence of the agents to point out the location of the contraband. The defendant testified that he stated there was a panel and pointed to it with his head. Kelly, Durst and Smith denied any recollection of the defendant being brought back to the walk-in closet.

It is undisputed that agent Durst eventually removed a panel from a natural pine tongue-and-groove wall[4] at the rear of the closet behind which was a crawl space containing marijuana stems and seeds on the floor, a Mossberg shotgun and a 450-pound safe measuring 4 feet in height and containing marijuana and cash. Prior to the removal of the panel none of the agents detected any odor of marijuana. However, as soon as the panel was removed a strong odor of marijuana emanated from the concealed area.[5] The defendant, himself a finish carpenter with many years of experience, testified that the panel was built well enough so as to be difficult to detect and that it could only be removed in a special way, first by sliding it to one side and then by pulling it out from the bottom using a certain

[4] The tongue-and-groove wall was not consistent with the rest of the closet finish.

[5] In his testimony the defendant first denied that there was any marijuana debris on the floor behind the panel, explaining that he kept all marijuana in the safe in sealed plastic bags. Later he allowed as how there may have been some marijuana on the floor.

knothole as a grip. He stated that the panel could not be removed in the manner described by agent Durst.

At no time was the defendant given *Miranda* warnings.

II. Legal Discussion

The government has represented that it does not intend to offer at trial any of the statements made by the defendant during the warranted search of his home, effectively conceding that they were elicited in violation of the *Miranda* rule. The government does intend to use the physical evidence found behind the closet wall and thus frames the real issue presented by the defendant's motion as ``whether the seizure of the physical evidence in the secret compartment had a basis independent of the defendant's statement [sic] or whether that seizure was the fruit of that allegedly illegally obtained statement [sic]." Memorandum in Support of Government's Objection to Defendant's Supplemental Motion to Suppress (Docket Item 20) at 1-2. Specifically, the government asserts that the physical evidence in question is admissible under the ``independent source" and ``inevitable discovery" doctrines. For his part, the defendant conceded in his closing argument that the search warrant constituted an independent source justifying the search of his residence but was not an independent source of knowledge of the existence of the concealed space, and asserts that it was not inevitable that the agents would have discovered the hidden space without his assistance. The defendant argues that the physical evidence seized from behind the closet wall is nothing more than the fruit of statements illegally obtained from him.

I agree that the search warrant itself does not legitimize the use at trial of the physical evidence in question since it does not identify the hidden space from which it was seized or suggest that any of the subject contraband was located there. I conclude, however, that the discovery of the evidence was

inevitable and, under the rule of *Nix v. Williams*, 467 U.S. 431 (1984), is admissible as an exception to the exclusionary rule generally applicable to the fruit of unlawful police conduct.

In *Nix* the Supreme Court extended the rationale of the ``independent source" doctrine -- namely, ``that the prosecution not be put in a *worse* position simply because of some earlier police error or misconduct," *id.* at 443 (emphasis in original) -- to circumstances where the discovery of seized evidence sought to be excluded was inevitable. The *Nix* rule is that ``[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received." *Id.* at 444. No proof of absence of bad faith is required. *Id.* at 445.

The required analysis is necessarily fact-based and, in the First Circuit, is to focus on the questions of independence and inevitability without the constraint of any bright-line rule. *See United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986).

It is undisputed that the authorities were authorized by warrant to search the defendant's entire residence, including concealed spaces, for the evidence in question and that this authority was derived independent of any statements made by the defendant following entry into his home. The suppression hearing record makes clear that the agents executing the search were informed by a cooperating individual who had engaged in several marijuana buys from the defendant at his residence that the defendant kept the marijuana he sold and money in a safe in the rear portion of the upper level of his residence which housed a bedroom, bath and walk-in closet. The agents were determined to locate this evidence[6] and concentrated their search in the bedroom/closet area. If unable to find the

[6] That the agents were focused on the safe and its contents is made clear in part from the fact they did not abandon a full-premises search upon discovering a large quantity of marijuana next to the

contraband in open spaces or within the observable wall and ceiling areas, they were prepared to and would have searched for hidden spaces in floors, walls and ceilings as they often did in executing searches. Despite the defendant's testimony that the hidden panel was not easily detectable, he did not suggest that it was beyond detection. Searching for hidden spaces was often done by these agents and I infer from agent Durst's description of his activities that they had become skilled at discovering them. Although the defendant described in detail the precise steps which must be followed in order to remove the panel -- intimating that only one with foreknowledge of its existence and construction could do so -- and testified that the panel could not have been removed in the manner described by agent Durst, the uncontroverted fact is that Durst alone removed the panel without specific instructions from the defendant.[7]

The facts of this case are if anything more compelling than those which led the *Nix* Court to conclude in that case that discovery of the murder victim's body was inevitable. There, following the discovery at a highway rest stop of certain clothing belonging to a missing girl and her suspected abductor, authorities organized a 200-volunteer search of a wide area. The volunteers were divided into teams of 4 to 6 persons each and each team was assigned to search a specific area designated on highway maps of two counties marked off in grid fashion. The search, which began at 10:00 a.m., was

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defendant at the kitchen table when they first entered.

[7] Even if the defendant's version of the contradicted events were credited, by his own testimony, as he stood with the agents in the walk-in closet, he did no more than state that there was a panel and pointed with his head to the tongue-and-groove wall. He never explained how the panel could be removed.

called off sometime after 3:00 p.m. when the suspect, then in custody, agreed to direct officers to the child's body. At this point the closest search team was 2-1/2 miles away from the culvert in a ditch beside a gravel road next to which the body was found. Although this spot was in neither of the original two counties marked off for search, the organizer of the search testified that if the search had not been suspended it would have continued into this locale using the same grid system. The volunteers had been told to search culverts, among other things. Search authorities testified that it would have taken another 3 to 5 hours to discover the body if the search had continued.

The search of the defendant's premises was at least as focused as that in *Nix* and had not gone on so long when the defendant offered the assistance he did as to suggest either an inability on the part of the agents, assisted if necessary by the trained canine that was available at the scene,[8] to discover the hidden space or an abandonment by them of their goal of locating the safe and its contents. I am satisfied that even without the defendant's help the agents would have persisted and eventually would have discovered the false wall and the evidence behind it. In sum, I conclude that the government has established by a preponderance of the evidence that discovery by lawful means of the evidence the defendant seeks to suppress was inevitable.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be *DENIED*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

[8] I infer from the evidence that, although the agents did not smell the marijuana on the floor behind the false wall prior to removal of the panel, the dog would have alerted to it.

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of September, 1992.

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David M. Cohen
United States Magistrate Judge